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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

—v.—

JAIRO JONATHAN ELIAS ZACARIAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE LAWYERS COMMITTEE FOR HUMAN RIGHTS THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF RESPONDENT

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* THE LAWYERS COMMITTEE FOR HUMAN RIGHTS THE AMERICAN JEWISH COMMITTEE

INTEREST OF THE *AMICI*

Amici curiae, the Lawyers Committee for Human Rights and the American Jewish Committee, offer this brief in support of respondent Jairo Jonathan Elias Zacarias, with the consent of the parties.

The Lawyers Committee for Human Rights (LCHR) is a national legal resource center working in the area of human rights, refugee and asylum law. In 1980, after the enactment of the

Refugee Act, the Committee created a national Refugee Project to monitor proposed legislation and regulations, to litigate significant cases regarding refugees and asylum, and to assist in providing legal representation for applicants for political asylum.

In the representation area, LCHR's Refugee Project uses volunteer lawyers to represent deserving persons who seek asylum irrespective of their nationality. Aside from its program in New York City, which provides assistance to over 200 individuals each year, LCHR works nationally to encourage and support private bar involvement in the asylum area. Since 1982, the Refugee Project has trained and provided practice materials to over 2,500 volunteer lawyers who represent indigent asylum applicants from around the world. In recognition of the unique need of asylum seekers for the effective assistance of counsel, and the interest of the private bar in meeting those needs, the Refugee Project has helped to organize and support volunteer lawyer programs to represent asylum applicants in Boston, New York, Miami, New Orleans, Houston, San Diego and Los Angeles. LCHR believes that the resolution of this case may affect numerous applications for protection under the Refugee Act.

The American Jewish Committee (AJC) is a national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. Since all American Jews are either immigrants or descendants of immigrants, if not refugees or descendants of refugees, AJC has always supported generous interpretations of immigration and refugee laws and policies. Through the years, therefore, AJC has joined with other *amici curiae* in numerous cases involving such issues before this Court. The case at bar affords AJC an opportunity to do so once again.

SUMMARY OF ARGUMENT

Petitioner claims that under the 1980 Refugee Act, persecution "on account of" an applicant's race, religion, nationality, membership in a particular social group or political opinion can only occur where the persecutor specifically intends to harm the asylum applicant because of the applicant's opinion or characteristic. Petitioner asserts that "[t]he asylum applicant may 'express[]' a political opinion, but if the persecutor's disagreement with that opinion did not in fact cause the persecution, then the persecution is not 'on account of * * * political opinion.'" Pet. Brief 14. In this brief, *amici* will show that Petitioner's argument proves too much, and that Petitioner is attempting to persuade the Court to adopt an interpretation of the refugee definition that does not comport with international standards.

Amici will demonstrate that, in fact, the international refugee definition, which the 1980 Refugee Act tracks virtually verbatim, has been interpreted more broadly in two fundamental ways by the Office of the United Nations High Commissioner for Refugees (UNHCR) and by various signatories — Canada, the United Kingdom, Germany, and Austria — to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1951 Convention and 1967 Protocol).[1] First,

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[1] July 28, 1951, 189 U.N.T.S. 150; Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577. In 1968, the United States acceded to the 1967 Protocol. In passing the 1980 Refugee Act, Pub.L.No. 96-212, 94 Stat. 102 *et seq.*, Congress intended to conform United States domestic law with its international obligations under the 1967 Protocol and directed that it should be interpreted consistently with that international instrument. *Immigration and Naturalization Service* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). The language chosen by Congress in 1980 to define "refugee" is practically identical to the corresponding provisions of the 1967 Protocol. *Cardoza-Fonseca*, 480 U.S. at 437.

persecution "for reasons of"[2] religious, moral or political opinion may exist "when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience." UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (*Handbook*) (1979) ¶ 170. Second, "[a] deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offense on account of his" opinion or characteristic. *Id.* at ¶ 169. In such circumstances, proof of a persecutor's motivation is not singularly determinative, as Petitioner suggests.[3]

In sum, this brief does not argue that all draft evaders may be refugees. It does maintain, however, that in a world where armies and guerrillas engage in inhuman conduct and threaten the lives of persons who resist forcible recruitment, certain military resisters deserve international protection as refugees. In particular, the international refugee definition covers (1) those who may be

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[2] As this brief focuses on the application of the international refugee definition by UNHCR and various signatories of the 1951 Convention and 1967 Protocol, we generally refer to the treaty language. The language of the 1980 Refugee Act at issue, "on account of," is virtually equivalent to the language of the 1951 Convention, "for reasons of." Compare Section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1991), with 189 U.N.T.S. 152.

[3] The Board of Immigration Appeals (BIA) of the United States Department of Justice disagrees with Petitioner's claim in a similar way. Citing the *Handbook*, the BIA has held that persecution exists where an asylum applicant would be required to engage in inhuman conduct as a result of military service required by the government. *Matter of A-G-*, 19 I&N Dec. 502, 506 (1987), *rev'd, M.A.* v. *U.S. I.N.S.*, 858 F.2d 210 (4th Cir. 1988), *rev'd, M.A.* v. *U.S. I.N.S.*, 899 F.2d 304 (4th Cir. 1990) (en banc). The BIA has not required any showing of the persecutor's intent in such cases. The BIA also has held that punishment for draft resistance may amount to persecution where disproportionately severe harm would result on account of a characteristic or belief. 19 I&N Dec. at 506.

forcibly recruited into military service despite deeply held convictions, and (2) those who face disproportionately severe punishment for resisting military recruitment. The decision of the Court below should, therefore, be affirmed.

ARGUMENT

I. THE INTERNATIONAL REFUGEE DEFINITION INCLUDES THOSE WHO OBJECT TO MILITARY SERVICE FOR REASONS OF CONSCIENCE AND THOSE WHO MIGHT SUFFER DISPROPORTIONATELY SEVERE PUNISHMENT FOR REFUSING TO SERVE.

Under the 1951 Convention and the 1967 Protocol, a refugee is a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" is outside the country of his nationality and unable or, owing to such fear, unwilling to avail himself of the protection of that country.

Petitioner argues for an unduly narrow, inflexible interpretation of this definition. According to the Petitioner, "unless the persecutor intends to hurt the asylum applicant because of *the applicant's* political opinion, the applicant is not eligible for asylum." Pet. Brief 14 (emphasis in original). To the Petitioner, "the persecutor's state of mind is determinative." *Id.* at 9.

The language of the international refugee definition quoted above does not require Petitioner's strict interpretation. Article I.A(2) of the 1951 Convention does not say that persecution exists solely if it is intended as such from the point of view of the persecutor. "Owing to a well-founded fear of being persecuted for reasons of . . . political opinion" points in two directions. The reasons can have their nexus either with the applicant's fear or with the persecutor's motivation.

Nor does the text specify whether the applicant for refugee status must fear persecution on account of a political opinion that he actually holds, or whether such fear may be based on a reasonable belief that the persecutor will impute an objectionable opinion to the applicant. It simply says that the persecution must be for reasons of one of the five enumerated factors. The application of the term at issue by UNHCR and various signatories to the 1951 Convention and 1967 Protocol confirms this understanding of the textual language.

A. Conscription That Disregards an Individual's Genuine Convictions Can Provide the Basis of an Asylum Claim, Regardless of the Persecutor's State of Mind.

As the UNHCR and signatory interpretations discussed below demonstrate, Petitioner ignores the fact that laws with seemingly legitimate aims can, in practice, severely penalize individuals in the exercise of their fundamental rights to freedom of thought, conscience, and religion. As such, Petitioner's restrictive approach conflicts with international standards interpreting the refugee definition.

It also disregards the purpose of refugee law, which is to provide protection against the violation of fundamental human rights, including the exercise of one's freedom of conscience. *See* Preamble to the 1951 Convention; Articles 14 and 18 of the Universal Declaration of Human Rights, U.N. General Assembly Resolution 217 A (III), 10 December 1948. Refugee law becomes particularly pertinent where there is a dispute between an individual and the State or *de facto* authority which would result in the punishment of the individual for exercising those protected rights.

That Petitioner errs in viewing the refugee definition in so narrow a fashion can be seen from the guidance provided by UNHCR to governments in interpreting the 1951 Convention and

1967 Protocol.[4] Paragraph 170 of the UNHCR *Handbook* states that:

> "the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience."[5]

No demonstration of the persecutor's motivation to harm the conscientious objector is required in such cases. What matters is the impact of the government's act: the effect would be to deny the objector his freedom of religion or conscience.[6] Thus in cases

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[4] There can be no doubt that the refugee law at issue in this case must be interpreted consistently with the provisions of the 1951 Convention and the 1967 Protocol. *See* footnote 1, *supra*, at 3.

[5] The *Handbook* was prepared by UNHCR at the request of States Members (including the U.S.) of the Executive Committee of the High Commissioner's Program (Executive Committee) for the guidance of governments. *See* Executive Committee Conclusions No. 8 (XXVIII), Report of the 28th Session of the Executive Committee of the High Commissioner's Program, UN Doc. A/AC. 96/549 (1977) at ¶ 53.6(g). The *Handbook* is based on UNHCR's accumulated knowledge, including the practices and procedures of States. *Handbook*, at 1. As this Court has observed, "the *Handbook* provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (citations omitted).

[6] Of course, just because a person evades military service does not make him a refugee. "A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat." *Handbook* ¶ 168. Moreover, not every asylum claimant who objects to military service for reasons of conscience will be a refugee. As UNHCR makes clear, an applicant claiming to be an objector of conscience must demonstrate the

(continued...)

concerning the general application of a law such as conscription where no alternative to military service exists, the persecutor's motivation is both unnecessary and irrelevant in establishing a well-founded fear of persecution based on an individual's beliefs.[7]

Decisions of municipal tribunals of other Convention and Protocol signatories also demonstrate that Petitioner's single-minded focus on the persecutor's state of mind is unwarranted. These authorities have found that, regardless of the persecutor's motivation, disregard of an individual's religious or political beliefs can amount to persecution on account of those beliefs.

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[6](...continued)
sincerity of his convictions:

> "The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions."

Id. at ¶ 174.

[7] Petitioner's argument fails to take account of *Matter of A-G-*, 19 I&N Dec. at 506, in which the BIA agreed with the principle that the persecutor's motivation is not always a necessary element of a well-founded fear of persecution. Citing the *Handbook*, the BIA held that persecution exists where an asylum applicant would be required to engage in inhuman conduct as a result of military service required by the government. The BIA clearly recognizes in such cases that the persecutor's state of mind is irrelevant. The persecutor does not intentionally conscript an individual to engage in inhuman conduct *because* the persecutor disagrees with that person's political opinion. Nor is the punishment of resisters necessarily motivated by any such disagree- ment. Petitioner's argument, then, certainly proves too much even under the BIA's jurisprudence.

The Canadian Immigration Appeal Board,[8] for example, granted asylum to a Jehovah's Witness from El Salvador who refused to serve in the military because of his "strongly held conscientious objections to taking human life." *Ramirez, Louis Alberto Mena* v. *Minister of Employment and Immigration*, IAB No. 86-6161 at 4 (May 5, 1987). The Canadian Board determined that the requirement of military service could amount to persecution:

> "It matters little that [the applicant] is subjected to the same conscription laws or practices as other young men of military age who are without such scruples; the issue is not equal treatment, but fear of persecution . . . . Were [the applicant] required to enter the military and undertake military duties which would deeply offend his sensibilities, he would, in the Board's opinion, be suffering persecution."

Id. The Canadian Board next addressed the question of "whether the cause of the fear [of persecution] is by reason of race, religion, nationality, membership in a particular social group or political opinion," *id.* at 5, and found that the applicant suffered persecution "by reason of religion":

> "It is the religion of [the applicant] that is at the root of his convictions and scruples. For the fear

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[8] Until recently, the Immigration Appeal Board (IAB) of Canada, the highest administrative tribunal concerned with immigration matters (comparable to the BIA), determined refugee appeals. In 1989, however, the IAB was restructured under a new name, the Immigration and Refugee Board, and its separate functions are now divided between the Convention Refugee Determination Division (CRDD) and the Immigration Appeal Division. The Immigration Act, R.S.C. 1985 [4th Supp.], c. 28. Canadian administrative cases discussed herein are cited by name where possible, but it has been the recent practice of the CRDD to delete identifying information from publicly released decisions. Such cases are cited by docket number and date.

> of persecution to exist, the state need not deliberately search out such people for systematic and conscious persecution; indeed, here the state apparently allows the witnesses of Jehovah to practice their religion in their Halls without hinderance. However, the Board finds a systemic persecution by reason of religion. It is the failure of the recruiting system to make allowances for the convictions of the conscientious objector that forms the basis of the fear. Such a failure amounts to fear of persecution within the meaning of the Act."[9]

Id. Here the Board did not require evidence of the state's intent to punish the applicant for being a Jehovah's Witness. "Systemic persecution" that forces an individual to commit acts that are abhorrent to his beliefs can be the basis for the grant of asylum.

Tribunals in the United Kingdom have also recognized that an individual can, in some instances, be eligible for asylum due to a form of "systemic persecution," as when South African citizens

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[9] The Canadian Immigration Act, 1976, reads:

> "'Convention refugee' means any person who
>
> > (a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
> >
> > > (i) is outside the country of his nationality and is unable
> >
> > or, by reason of that fear, is unwilling to avail himself of the protection of that country."

R.S.C. 1988, c. 35, S. 1(2).

have faced punishment for refusal to serve in the military because of the individuals' abhorrence to apartheid. Three such U.K. cases are described by the Immigration Appeal Tribunal in *P.P. Matkov* v. *Secretary of State for the Home Department,* No. TH/106300/83 (3331) at 5-6 (July 19, 1984). The tribunal explained that where the law of the land involves "a course of conduct abhorrent to a fundamental concept of our society[,] any sanctions imposed to enforce it may amount to persecution, provided the refusal to carry out the course of conduct was based on a ground specified by the Immigration Rules." *Id.*[10] Reflecting the protection of human rights fundamental to the 1951 Convention and 1967 Protocol, *see supra* at 6, the tribunal in *Matkov* thus recognized that a government can persecute an individual on account of his beliefs merely by enforcing a law of general application.[11] Petitioner's suggested standard, however, would not allow asylum in such circumstances.

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[10] The U.K. Immigration Rules state:

> "A person may apply for asylum in the United Kingdom on the ground that, if he were required to leave, he would have to go to a country to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any such claim is to be carefully considered in the light of all the relevant circumstances."

See Matkov at 1.

[11] The U.K. decisions did not go as far as the Canadian Board, *supra,* at 8-10. The tribunal in *Matkov* contrasted the South African cases with *Doonetas* v. *Secretary of State,* No. TH/12339/75 (820) (Oct. 14, 1976), in which the tribunal had held that an individual was not necessarily eligible for asylum because he objected to military service based on his religious beliefs. *Id.* The tribunal specifically stated that the South African cases qualified *Doonetas* in stressing that persecution can result from a law of general application involving abhorrent conduct. *Matkov* at 6.

Like the Canadian Board, the highest Administrative Court in Germany[12] granted asylum to an individual whose religious convictions did not permit him to bear arms. BVerwG IC 41.60 (29 June 1962). The court found that the asylum applicant:

> "was involved in a conflict between two duties: on the one hand, the State required him to perform military service; on the other hand, his religion required him to refrain from such service for reasons of conscience. If the State takes action against the person involved in such a conflict, the effect as far as he is concerned is persecution because of his religion . . . . "

Here again, in focusing on the perspective of the asylum applicant, the court did not require proof of the persecutor's subjective motivation.

Austrian law also recognizes that a person who objects to military service based on deeply held convictions may be a refugee. Interpreting the Austrian Asylum Law of 1968, the Federal Ministry of the Interior issued a regulation which states that an individual is eligible for asylum if that individual (1) refuses to serve in the military for Convention reasons and (2) is permitted no option to perform civilian rather than military service. The rule recognized that severe punishment would follow for such a refusal to serve. Regulation No. 22.501/4/-II/C/75 (June 4, 1975). The elements of this Austrian regulation evidence a concern with the impact of persecution on the victim, rather than with the persecutor's state of mind.

In sum, these cases, the regulation, and the *Handbook* demonstrate that under the 1951 Convention and the 1967

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[12] Administrative courts hear all the cases involving administrative law matters in Germany. The highest administrative court is the Federal Administrative Court in Berlin.

Protocol, conscription that disregards a person's genuine convictions may be the sole ground for a valid claim to refugee status — regardless of the persecutor's state of mind.

B. An Individual May Be Persecuted "On Account of" Political Beliefs If He Faces Disproportionately Severe Punishment for an Offense.

In certain circumstances, particularly in cases of refusal to perform military service, the authorities of several signatory States have determined that an individual possesses a well-founded fear of persecution for reasons of his political or religious beliefs when a persecutor threatens that individual with a harm out of proportion to any "offense" he may have committed. As stated in the UNHCR *Handbook:* "A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offense on account of his race, religion, nationality, membership of a particular social group or political opinion." *Handbook* ¶ 169; *accord Matter of A-G-*, 19 I&N Dec. at 506. The victim in such instances may object to military service for religious, moral or political reasons about which the persecutor may not know or care. But these cases show that the persecutor typically interprets the individual's refusal to serve as an act of political opposition and for this reason threatens the individual with harsh punishment.

As such, the logic of the decisions discussed, *infra*, at 14-19, would appear to be consistent with Petitioner's position regarding the persecutor's motivation. In these cases, the severity of the punishment is generally taken as conclusive evidence of the persecutor's intention to inflict suffering on account of a person's imputed political opinion.[13] Thus even if the persecutor's

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[13] The UNHCR *Handbook* recognizes that an applicant need not demonstrate that he is at risk because of an opinion that he actually holds where the persecutor attributes an objectionable opinion to him. *Handbook* ¶ 80.

(continued...)

motivation could be described as a critical element in the determination of whether an individual fears persecution, these cases demonstrate the ease with which tribunals find this element satisfied.

Specifically, in a variety of decisions, Canadian courts and administrative bodies have granted asylum to applicants who were perceived as political enemies simply because they refused to perform military duty. In *Jorge Ardon Abarca* v. *Ministry of Employment and Immigration,* IAB No. W86-4030-W (Mar. 21, 1986), the applicant refused to report for military duty because he objected to human rights abuses perpetuated by the Salvadoran army. *Id.* at 2, 6. The applicant had testified that he had never been politically active, *id.* at 2, and there was no evidence that the government knew precisely why the applicant had refused to serve his military obligation. However, evidence indicating that the applicant feared he "would be detained, tortured and beaten, or killed" for his unwillingness to serve in the military, *id.*, did convince the Canadian Board that the applicant's fear was "one of persecution, not mere prosecution." *Id.* at 6. The Canadian Board found that the applicant's refusal to serve "has been perceived as a serious or threatening act of political opposition to the system as a whole." *Id.*

In another case involving a Salvadoran who feared severe punishment for his desertion from the army, the Canadian CRDD reviewed international jurisprudence and the UNHCR *Handbook* to determine the eligibility of the applicant for asylum. CRDD

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[13](...continued)
Petitioner quotes the critical language of Paragraph 80, Pet. Brief at 25 n.9., and suggests that the BIA "echoes" the UNHCR interpretation.

Petitioner's principle regarding the persecutor's motivations would logically apply to a Convention characteristic (race, religion, nationality, or social group) as well as an opinion. Thus, for example, persecution would exist where the authorities mistakenly attribute a racial characteristic to a person and consequently threaten his life or liberty, as the Nazis did.

No. T89-05407 at 3-4, 6 (May 31, 1990). The CRDD held that the applicant's refusal to serve would be:

> "considered to be not merely a breach of the law, but an act of disloyalty to the government. Such deserters are labelled 'subversives' and 'guerrilla supporters'. The resulting punishment could be torture or death."

Id. at 6. The CRDD concluded that the applicant was "a Convention refugee by reason of his political opinion" because "the possible excessive punishment of torture and death would not be for the act of desertion but for the perceived political act taken against the government". *Id.*; *accord Padilla* v. *Canada,* [1991] F.C.J. No. 71 (C.A.,[14] Jan. 31, 1991); CRDD No. T89-01690 (Jan. 8, 1990).

As indicated by these cases, the Canadian authorities do not recognize "draft evaders" or "military deserters" *per se* as refugees. Instead, these tribunals have examined whether punishment for disobedience is consistent with standards of fundamental fairness.[15] For example, in CRDD No. V89-00924 (June 8, 1990), the Canadian CRDD granted asylum to an Iraqi citizen who feared execution as a military deserter if he returned to Iraq. *Id.* at 3. The CRDD held that, although fear of punishment "solely for refusal to perform military service" is not considered persecution,

> "[i]t has however been recognized internationally that when the refusal to perform military service

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[14] There is only one Federal Court of Appeals in Canada.

[15] *Cf. Musial* v. *M.E.I.*, [1982] 1 F.C. 290, 38 N.R. 55 (C.A.) (punishment faced for refusal to serve in Polish military constituted only prosecution, not persecution).

> stems from sincere personal or religious conviction, or an unwillingness to participate in internationally condemned acts of violence, or where the punishment for refusal to perform service is disproportionately severe, this punishment may amount to persecution."

Id. at 5 (citing UNHCR *Handbook* ¶¶ 167-174). Based on evidence that the applicant feared that he would be executed because the government would consider him a political enemy of the regime for his refusal to serve, the CRDD determined that the applicant "has established a well-founded fear of persecution for reason of his political opinion (as perceived by the Iraqi government)." CRDD No. V89-00924 at 4, 6.

Similarly, in Decision No. T89-01610 (July 1989), the CRDD held that although the applicant, an Afghan national, had never demonstrated strong political convictions, "his refusal to join in the fighting on the government's side [in the civil war] *could* be perceived by the government as an opposing political statement" for which the applicant faced "disproportionately severe punishment". *Id.* at 5 (emphasis added). On this basis, the CRDD granted political asylum.[16]

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[16] Persecution for imputed political opinion has not been limited to cases that involve individuals refusing to perform military service. In *Hilo* v. *Canada*, [1991] F.C.J. No. 228 (C.A., March 15, 1991), the asylum applicant was a Syrian national who was part of a charitable religious group that actively raised funds to send food to needy people in Lebanon. Syrian police, suspicious of the group's intentions, warned the group to stop meeting, then beat and imprisoned one member of the group who had attempted to explain the group's philanthropic motivation. The court found that the Syrian security forces persecuted the group because they thought it was "politically motivated against the government and thus politically undesirable". In this case, there was no nexus between the views of the applicant and the views attributed to him by the authorities. Nonetheless, the court held that the applicant was persecuted on account of political opinion and was a refugee within the meaning of the Convention.

In a case analogous to Respondent's, the Canadian CRDD granted asylum to an applicant threatened by non-governmental agents of persecution. CRDD No. M89-00149 (Feb. 20, 1989). In that case, the applicant, a Lebanese national, went into hiding after he had been ordered to join the Amal militia by armed individuals. The applicant refused to join the militia because he knew that the militia killed innocent people. *Id.* at 2. Recognizing that the applicant's refusal to join the militia was for "valid reasons of conscience," and that the applicant's "life was at stake because he refused to join,"[17] the Canadian CRDD held that the applicant was eligible for asylum. *Id.* at 3. The CRDD did not examine the subjective motivation of the persecutor to determine whether the "persecutor's disagreement with the victim's . . . beliefs [was] the cause in fact of the persecution." *See* Pet. Brief 19.

Tribunals in the U.K. have also recognized that punishment for noncompliance with a law compelling military service can "amount to persecution . . . if a State . . . exceed[s] that which is thought to be acceptable limits in enforcement because of its national interests." *Matkov* at 7.[18] Regardless of whether the state knows of and disagrees with a victim's opinion or conviction that causes that individual to breach a legal duty, punishment for that breach can constitute persecution.[19]

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[17] In many instances, non-governmental agents of persecution are less likely to have an established judicial system capable of applying the rule of law to individuals who refuse to be forcibly recruited.

[18] *See also R* v. *Secretary of the State for the Home Department ex parte Zia Mehmet Binbasi*, [1989] Imm AR 595, 599 (July 25, 1989) (although asylum cannot be granted simply because applicant is unable to "enjoy the 'full range of freedoms he would enjoy" in the U.K., "a judgment has to be made as to whether the interference with freedom is sufficiently serious to merit asylum").

[19] The British courts have, in other circumstances, found that punishment for breach of a law of general application does not constitute persecution, but

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German tribunals have granted asylum in circumstances such as those described in the Canadian cases cited *supra*, at 14-17. In its decision of June 23, 1988, the Bavarian Administrative Court, Ansbach recognized that a valid asylum claim can be based on fear of extrajudicial punishment for reasons of perceived political opposition. Bayer.VG (AN 19 K 87.35820). In that case, the Ethiopian applicant was from the province of Tigre and had refused to serve in the military. Evidence indicated that the government would likely detain, torture, or execute the applicant solely for suspicion of political opposition, a suspicion based on the applicant's refusal to serve in the military.[20]

In sum, the cases discussed in this brief show that a persecutor's desire to overcome an individual's actual belief is not always necessary to establish a well-founded fear. The objector of conscience must demonstrate that his convictions "are not taken into account by the authorities in requiring him to perform military service," *Handbook* ¶ 172, and that "but for" his sincere convictions he would not be at risk of serious harm. Others who resist military service must show that disproportionately severe punishment may result from a refusal to serve. Such an

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[19](...continued)
those cases did not involve either (1) legal obligations to engage in abhorrent conduct or (2) disproportionate punishment for the breach. *See Atibo* v. *Immigration Officer*, [1978] Imm AR 93 (Feb. 28, 1978) (applicant not persecuted simply because he would be punished in Mozambique if he proselytized in public, in violation of law prohibiting all public meetings). The distinction featured in *Atibo* is reflected as well in international human rights law, which includes refugee law. The exercise of freedom of expression, (generally given unqualified protection under the First Amendment of the United States Constitution), is subject to certain restrictions regarding the protection of national security and public order. *See* Art. 19(3)(b), International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1967).

[20] *See also* Decisions No. 438-01986-88 and No. 438-01318-86 of the Federal Office for the Recognition of Foreign Refugees (Aug. 3, 1988) (applicants granted asylum where they faced significant punishment for refusal to serve in the Iraqi army).

interpretation of persecution "for reasons of" a political opinion accords with the guidance provided by the international agency charged with supervising the application of the 1951 Convention and 1967 Protocol. *See* U.N. General Assembly Res. 428(V) 1950, Annex: Statute of the Office of the United Nations High Commissioner for Refugees, ¶ 8(a).

Rather than interpret the definition consistently with its actual application, however, Petitioner chose to construct its unduly inflexible standard from the limited definitions of various dictionaries. As a basis for doing so, Petitioner explained that this approach is required "[i]n the absence of . . . common law meaning." Pet. Brief 12. This asserted premise ignores the fact that for some forty years signatories have interpreted substantially the same language in connection with the myriad manifestations of persecution that have occurred in the world.[21] As demonstrated below, United States courts give significant weight to the practice of other States when interpreting the same treaty.

II. STATE PRACTICE SHOULD BE GIVEN CONSIDERABLE WEIGHT IN THE INTERPRETATION OF THE CONVENTION AND THE PROTOCOL.

State practice is clearly a relevant aid in the interpretation of the 1951 Convention and 1967 Protocol. According to the Vienna Convention on the Law of Treaties,[22] when interpreting

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[21] Because victims of persecution at times face circumstances that defy application of an inflexible standard of asylum eligibility, it is essential that the refugee definition be applied on a case-by-case basis. *See Cardoza-Fonseca*, 480 U.S. at 448.

[22] May 23, 1969, 1155 U.N.T.S. 331. The United States has signed the Vienna Convention but has not ratified it. The United States generally recognizes the Vienna Convention as codifying customary international law
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a treaty, "[t]here shall be taken into account . . . [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Art. 31, 155 U.N.T.S. at 340.

It has been well established by this Court that "'treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Eastern Airlines, Inc.* v. *Floyd*, 111 S. Ct. 1489, 1493 (1991) (quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-32 (1943) (emphasis added)). Accordingly, this Court has stated that "[w]e must . . . consult the opinions of our sister signatories in searching for the meaning" of the treaty term in question, *Eastern Airlines*, 111 S. Ct. at 1501, and that "'the opinions of our sister signatories [are] entitled to considerable weight.'" *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (quoting *Benjamins* v. *British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979)).

This Court has previously justified its interpretation of a treaty term as "consistent with . . . the conduct of the parties to the Convention, and the weight of precedent in foreign . . .

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[22](...continued)
binding on U.S. courts. *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States, Introductory Note to Part III ("The Department of State has on various occasions stated that it regards particular articles of the Convention as codifying existing international law; United States courts have also treated particular provisions of the Vienna Convention as authoritative." (citing Department of State practice and court cases, including judicial application of Article 31 on interpretation)); *see also* Congressional Research Service, 98th Cong., 2d Sess., S. Pr. No. 98-205, *Treaties and Other International Agreements: The Role of the United States Senate* 41 (1984) (even though the United States is not a party, the Vienna Convention "retains its status as a primary source of international law concerning treaties, *even for nonparties*" (emphasis added)).

courts." *Saks*, 470 U.S. at 400.[23] Just this past term, the Court concluded that "the evidence of the post-[signature] 'conduct' and 'interpretations of the signatories' . . . support[ed] [its] narrow translation" of a key treaty term. *Eastern Airlines*, 111 S.Ct. at 1499 (quoting *Saks*, 470 U.S. at 403).

Therefore, when interpreting the phrase "for reasons of . . . political opinion" in the 1951 Convention, the Court should consider how other parties' courts and administrative agencies have interpreted this phrase and should give these interpretations "considerable weight."[24] In this instance, the application of this principle requires the rejection of Petitioner's unjustifiably narrow interpretation of the ambit of refugee protection.

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[23] In interpreting Article 17 of the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, the Court found that "[r]eference to the conduct of the parties to the Convention and the subsequent interpretations of the signatories help[ed] clarify the meaning" of the word "accident." *Saks*, 470 U.S. at 403.

[24] This Court's own interpretations of the international refugee definition have been considered by other parties' courts. *See Chan* v. *Minister for Immigration and Ethnic Affairs*, 87 A.L.R. 412 (1989); *Regina* v. *Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] 2 W.L.R. 92, 1 All E.R. 193.

CONCLUSION

For the foregoing reasons, the Lawyers Committee for Human Rights and the American Jewish Committee respectfully urge the Court to affirm the decision of the Court of Appeals.

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